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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 847

ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX.

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINION BELOW.

The first decision of the Court of Appeals remanded the case to the District Court to make necessary findings of fact vital to a decision of the cause, to wit, findings as to delivery to the carrier in good condition and as to latent and concealed defects in loading. *Armour Research Foundation* v. *Chicago, R. I. & P. R. R. Co.*, 7 Cir., 297 F. 2d 176, 179.

The second decision of the Court of Appeals affirmed the judgment of the District Court upon the ground that the findings of fact of the District Court made in conformity

with the mandate of the first decision of the Court of Appeals were not clearly erroneous.

Armour Research Foundation vs. *Chicago, R. I. & P. R. R. Co.*, 7 Cir., 311 F. 2d 493, 494.

QUESTION PRESENTED.

In an action to recover damages to a shipment transported by common carriers in interstate commerce, must the evidence establish that the shipment was in good condition when delivered to the initial carrier for movement?

STATUTES INVOLVED.

In addition to the statutes referred to in petitioner's petition, this proceeding involves 28 U. S. C. 2101(c) (Act of June 25, 1948, 62 Stat. 961), which provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding, before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT.

Petitioner's statement is accurate and complete enough until it reaches the point of the first decision in this cause. The statement is best corrected from that point on by a complete statement by respondent.

Petitioner filed a petition for rehearing after the first decision of the Court of Appeals. The grounds for that petition, which was denied over one year prior to the filing of the petition for certiorari, were identical to those raised herein (Supp. App.). Petitioner made no effort at that

time to bring this cause to this Court by filing a timely petition for a writ of certiorari.

In conformity with the mandate of the first decision, the trial court made the following findings of fact (311 F. 2d 493, 494):

> The evidence does not establish that the contents of the motor truck were in good condition when delivered to the Southern Pacific at Inyokern, California.
>
> Plaintiff assumed the responsibility of loading. The evidence does not warrant the finding that the contents of the van of the motor truck (highly sensitive electronic equipment and instruments) were sufficiently packed and fixed up for rail transportation.
>
> The electronic equipment was loaded in the motor truck by the plaintiff without any dunnage, bracing, supports or straps. Plaintiff failed to properly load and secure the electronic equipment for rail transportation. The defects in loading were latent and concealed and could not be discovered by ordinary observation on the part of the carriers.

Judgment in accordance with the findings of fact was entered for respondent, and, upon petitioner's appeal, the judgment was affirmed upon the ground that the findings of fact were not clearly erroneous (311 F. 2d 493, 494).

REASONS FOR DENYING THE WRIT.

I.

THE PETITION FOR CERTIORARI WAS NOT FILED WITHIN THE TIME PRESCRIBED BY LAW.

A writ of certiorari intended to bring any judgment before this Court for review must be applied for within 90 days after the entry of the judgment, unless the time has been extended by a Justice of the Court, 28 U. S. C. 2101(c).

The petition for rehearing in the first decision was denied on February 1, 1962. The petition for writ of certiorari was filed February 21, 1963. No extension of time was sought.

It is the first decision about which petitioner complains here. The second decision is confined to the scope of review under Rule 52(a) of the Federal Rules of Civil Procedure. The second decision merely holds that the findings of fact of the trial court are supported by the evidence.

The arguments made in the petition for certiorari are the same as those raised in the petition for rehearing filed after the first decision in this case, which petition was denied over one year prior to the filing of the petition for certiorari.

It results that the petition for certiorari was not filed within the time prescribed by law.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The evidence in this cause did not establish that the contents of the motor truck were in good condition when delivered to the Southern Pacific at Inyokern and, accordingly, judgment was entered for respondent (311 F. 2d 493, 494). In an action to recover damages to a shipment transported by a common carrier in interstate commerce, this Court has uniformly held that the evidence must establish that the shipment was in good condition when delivered to the carrier for movement. *Chicago & N. W. Ry. v. Whitnack Co.*, 258 U. S. 369, 371; *C. & O. Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416, 422.

Petitioner, at page 8 of its petition, baldly asserts that the shipper should not be required to prove good condition. There is no conflict between the Court of Appeals decision and decisions of this Court. Petitioner's erroneous assertion cannot invoke the jurisdiction of this Court.

It is perhaps petitioner's contention that the reception of the bill of lading in evidence proved that the unknown, undescribed contents of the motor truck were in good condition. Such a contention finds no support in any of the cases cited by petitioner.

The bill of lading expressly provided that the condition of the contents was unknown. This Court, in *Clark, et al. v. Barnwell, et al.*, 12 Howard 272, 283, held that a bill of lading containing such a provision does not constitute proof of the good condition of the contents. This holding has been followed in *The Niel Maersk*, 2 Cir., 91 F. 2d 932; *Albers Bros. Milling Co. v. Hauptman*, 9 Cir., 95 F. 2d 286.

Petitioner asserts that it is the carrier's duty to discover the existence of undescribed contents and the manner in which they are loaded. This assertion finds no support in any of the cases cited by petitioner and is just another attempt by petitioner to ignore the finding of the trial court, which was affirmed upon appeal, that ordinary observation of the described shipment would not reveal the existence of contents nor the manner in which any such contents were loaded (311 F. 2d 493, 494).

Petitioner claims that 49 U. S. C. 101 provides that a carrier may relieve itself of the duty to inspect and to provide against defective loading only by marking the bill of lading "shipper's weight, load and count", and that unless the bill of lading is so marked the carrier does not have the defense of improper loading available to it. Petitioner cites no authority whatever for these novel arguments, and in fact does no more than state its position completely without benefit of logical development.

The only goods described in the bill of lading were a motor truck and trailer. The notice "shipper's weight, load and count" would have been a useless act under the circumstances in that the carriers did not know or should have known of the existence of any contents.

CONCLUSION.

It is respectfully submitted that the petition for writ for certiorari should not be denied because it was not filed within ninety days from the first judgment of the Court of Appeals, and because the decision of the Court of Appeals is not in conflict with applicable decisions of this Court.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 13404

Armour Research Foundation of Illinois Institute of Technology, *Plaintiff-Appellant*, *vs.* Chicago, Rock Island and Pacific Railroad Company, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. — Honorable J. Sam Perry, Judge Presiding.

PETITION FOR REHEARING.

I.

It is respectfully submitted that the plaintiff in its original brief on page 12 set out an exact quotation from a Supreme Court decision as follows:

> *Secretary of Agriculture* v. *United States*, 350 U. S. 162, footnote 9 beginning on page 165: "It is conceded that Sec. 20(11) codifies the common law rule making a carrier liable, without proof of negligence, for all damages to the goods transported by it, *unless it affirmatively shows* that the damage was occasioned by the shipper, Acts of God, the public enemy, public authority or the inherent vice or nature of the commodity. See, *e.g.* Bills of Lading 52 ICC 671, 679;

Chesapeake & O. R. Co. v. *Thompson Mfg. Co.*, 270 U. S. 416, 421-422; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 506-507, 509."

It is further respectfully submitted that this court in its opinion apparently did not consider the pertinent words which are italicized. These words, "unless it affirmatively shows" mean that unless the defendant carrier affirmatively shows, and cannot reasonably be subject to any other interpretation.

The defendant accepted this burden in its second defense, which is an affirmative defense, which states:

> "Plaintiff's loss or damage, if any, were caused by the acts of plaintiff, shipper, their agents or employees."

This issue was argued before the trial court. If the trial court, after considering the evidence at the close of the plaintiff's case or at the close of all of the evidence had determined that the evidence supported the defendant's affirmative defense, then this case could have easily and summarily been disposed of by an affirmative finding that the shipment delivered to the defendant carrier was in improper condition or that there was a latent defect. The trial court's conclusion of law as to the misdescription of the shipment would not have been needed or necessary.

II.

It is further respectfully submitted [that whatever distinctions, raised by particular cases on particular fact situations, may have been made by other courts,] the law as laid down by the Supreme Court in *Hannibal* v. *Swift*, 79 U. S. 262 and cited in the plaintiff's original brief on page 17 is still the law, and that such law is supported by the decision in *Secretary of Agriculture* v. *United States*, cited above.

It is further respectfully submitted that the decision of the Supreme Court in *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331, also cited by the plaintiff in its original brief on page 17, is another clear statement of the principle announced in *Hannibal* v. *Swift*, and a further pronouncement of its reasonableness.

If the defendant carrier wanted to shift the burden of showing proper loading or proper commodity to the plaintiff shipper, there is adequate provision in the Bill of Lading Act for such shifting.

Section 21, Bill of Lading Act, 49 U.S.C.A., Section 101:

> "The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading."

It is contended that it is established law that proof of delivery and damage is the plaintiff's burden and that the defendant in order to take advantage of the exceptions to its liability as an insurer must bear the burden of proof.

There is not one finding of fact that would support the defendant's affirmative defense. The absence of such finding is more than a presumption that there were no facts to support it.

III.

In the findings of fact, the trial court found as follows:

> 5. On April 22, 1957, at 5:00 P.M., Southern Pacific Lines received at Inyokern, California, from Director of Supply, Naval Ordnance Test Station, China Lake, California, the aforesaid property and issued its Bill of Lading.
>
> 19. The electronic devices, cameras, and equipment, contained in the van were damaged to the extent of $8,091.40.

These are the two affirmative findings necessary to establish the plaintiff's prima facie case. They are definitive and ultimate facts. All other findings except such findings as were necessary for consideration of the conclusion of law with reference to the misdescription of goods in the Bill of Lading were surplusage.

To penalize the plaintiff because findings with reference to the defendant's affirmative defense were not made by the trial court would in effect be permitting the defendant to reargue issues that have once been decided in favor of the plaintiff.

CONCLUSION.

The plaintiff respectfully submits that judgment in the amount of $8,091.40 should be entered in favor of the plaintiff and that the case should not be remanded.

Respectfully submitted,

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